

The Administrative Law Judge denied claimant's counsel's request for attorney fees associated with the hours expended before the Court of Appeals stating that requests for appellate attorney fees must be made to the appellate court under Supreme Court Rule 7.07 (2010 Kan. Ct. R. Annot. 62), despite statutory authority to the contrary. Claimant argues that the ALJ is given the statutory authority to award attorney fees by K.S.A. 44-536(g). Respondent agrees with the ALJ's determination that the Supreme Court Rule controls and therefore, any request for attorney fees for representation provided before an

appellate court must be determined by the appellate court, pursuant to the Supreme Court Rule.

The claimant argues the ALJ erred in relying on *Snider*¹ to deny her counsel's motion for attorney fees for the time expended for defending the Board's decision before the Court of Appeals when *Snider* is under review with the Supreme Court and because it dealt with attorney fees to be awarded in civil appeals from the trial court, pursuant to K.S.A. 40-256 and K.S.A. 40-908. Claimant argues that the Board should reverse and remand this matter back to the ALJ for an award of attorney fees, including those associated with this appeal.

Respondent argues that the ALJ should be affirmed as the rationale and logic of *Snider* applies equally to workers compensation matters. Respondent further argues that Supreme Court Rule 7.07(b) (2010 Kan. Ct. R. Annot. 62) does not exclude workers compensation matters as a part of "any case in which the trial court had authority to award attorney fees".

FINDINGS OF FACT

This matter originally came before the Board on an appeal from a July 2, 2010 Order granting penalties of \$350.00 to claimant for respondent's failure to timely pay an Award issued by the ALJ on May 19, 2010. The Board affirmed the award of penalties, finding that claimant had satisfied the requirements of K.S.A. 44-512a(a).

The Board's decision of September 10, 2010, was then appealed to the Kansas Court of Appeals. The Board's decision awarding the penalties was affirmed by the Court in its Memorandum Opinion of September 23, 2011.

Claimant then filed a Motion with the Workers Compensation Division under K.S.A. 44-536(g) requesting attorney fees for the time expended before the Kansas Court of Appeals. The record indicates that respondent voluntarily paid claimant counsel's attorney fees for the hours expended before the Workers Compensation Board. The ALJ denied the request for attorney fees for the time spent before the Court of Appeals, citing Supreme Court rule 7.07 (2010 Kan. Ct. R. Annot. 62) and *Snider*. Claimant appeals, arguing that *Snider* should not have been cited or relied upon as it is under review by the Kansas Supreme Court and any reference to the case is prohibited by Supreme Court Rule 8.03 (2010 Kan. Ct. R. Annot. 68). Claimant further argues that the Kansas Workers Compensation Act (Act) is self-contained and any decision about attorney fees would properly be made pursuant to K.S.A. 44-536(g).

¹ *Snider v. American Family Insurance Co.* 45 Kan. App. 2d 196, 207 (2011), rev. granted Sept. 21, 2011.

Respondent contends that Supreme Court Rule 7.07 (2010 Kan. Ct. R. Annot. 62) was properly applied in this matter and claimant's only recourse was to have timely filed the proper motion and affidavit before the Court of Appeals, which claimant acknowledges was not done.

PRINCIPLES OF LAW AND ANALYSIS

Both the ALJ and respondent cite *Snider*, which references are objected to by claimant. The Board finds, as *Snider* is currently before the Supreme Court, it will not address that decision.

Supreme Court Rule 8.03(i) (2010 Kan. Ct. R. Annot. 68) states:

(i) EFFECT OF COURT OF APPEALS' DECISION PENDING REVIEW. The timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review or during the time in which to file a petition for review, the opinion of the Court of Appeals is not binding on the parties or on the district courts. Any interested person who wishes to cite a Court of Appeals opinion for persuasive authority before the mandate has issued shall note in the citation that the case is not final and may be subject to review or rehearing. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate shall not issue. If a petition for review is granted in part, a combined mandate shall issue when appellate review is concluded, unless otherwise specifically directed by the Supreme Court. If review is refused, the decision of the Court of Appeals shall be final as of the date of the refusal, and the mandate of the Court of Appeals shall be issued by the Clerk forthwith.

Supreme Court Rule 7.07 (2010 Kan. Ct. R. Annot. 62) states:

(a) General. In any case there shall be separately assessed when applicable all fees for service of process, witness fees, reporter's fees, allowance for fees and expenses of a master or commissioner appointed by the appellate court, and any other proper fees and expenses. All such fees and expenses shall be approved by an appellate court unless specifically fixed by statute. When any such fees and expenses are to be anticipated in a case, the appellate court may require the parties to the proceeding to make deposits in advance to secure the same.

In disposing of any case before it, an appellate court may apportion and assess any part of the original docket fee, the expenses for transcripts, and any additional fees and expenses allowed in the case, against any one or more of the parties in such manner as justice may require. When a decision of the district court is reversed, the mandate will direct that appellant recover the original docket fee and expenses for transcripts, if any.

(b) Attorney Fees. Appellate courts may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees.

Any subsection (b) motion for attorney fees on appeal shall be made pursuant to Rule 5.01.

An affidavit shall be attached to the motion specifying: (1) the nature and extent of the services rendered; (2) the time expended on the appeal; and (3) the factors considered in determining the reasonableness of the fee. (See KRPC 1.5 Fees.)

The motion shall be filed with the clerk of the appellate courts no later than fifteen (15) days after oral argument. If oral argument is waived, the motion shall be filed no later than fifteen (15) days after either the day of argument waiver or the date of the letter assigning the case to a non-argument calendar, whichever is later.

(c) Frivolous Appeals. If the appellate court finds that an appeal has been taken frivolously, or only for purposes of harassment or delay, it may assess against an appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel. A motion for attorney fees shall be filed in the manner set forth in subsection (b). The mandate shall then include a statement of any such assessment, and execution may issue thereon as for any other judgment, or in an original case the clerk of the appellate courts may cause an execution to issue.

(d) Unnecessary Transcripts. On its own motion, or on the motion of an aggrieved party filed not later than fourteen (14) days after an assessment of costs hereunder, the appellate court may assess against a party or his counsel, or both, all or any part of the cost of the trial transcript which the court finds to have been prepared as the result of any unreasonable refusal to stipulate pursuant to a written request and in accordance with Rule 3.03 to the preparation of less than a complete transcript of the proceedings in the district court.

Supreme Court Rule 7.07 (2010 Kan. Ct. R. Annot. 62) sets forth the specific procedure for requesting attorney fees for time spent before the appellate courts. The Kansas Supreme Court addressed Rule 7.07 in *Evans*.²

In *Evans* the plaintiff filed a motion for additional attorney fees incurred in connection with the appeal. In its decision, the Court of Appeals remanded the case to the district court for the determination of appellate attorney fees. This, the Supreme Court held, "is contrary to our Rule 7.07(b) (1990 Kan. Ct. R. Annot. 37)."³ Even though the statute in question, K.S.A. 40-256 allowed for the trial court to award attorney fees for services "including proceedings upon appeal", the Court in *Evans* held that civil appellate

² *Evans v Provident Life & Accident Ins. Co.*, 249 Kan. 248, 815 P.2d 550 (1991).

³ *Id.* at 265.

attorney fee awards are to be determined by the appellate court hearing the appeal. Motions for attorney fees incurred before the Court of Appeals should be determined by the Court of Appeals. The matter was then remanded to the Court of Appeals so that the question of the award of attorney fees for appellate work could be answered by the Court of Appeals.

In applying the ruling in *Evans* to this matter, the Board finds that claimant's application for attorney fees for the time spend before the Court of Appeals should have been brought before the Court of Appeals for a determination. That was not done, the Order of the ALJ denying claimant's counsel's request for attorney fees for the time expended before the Court of Appeals is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated November 17, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge